

SUPREME COURT. U. S.

FILED

APR 11 1959

JAMES R. BROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 439

JACKSON D. MAGENAU, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,

*Petitioner,*

v.

AETNA FREIGHT LINES, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT

JOHN E. BRITTON,  
WILLIAM F. ILLIG,  
615 Masonic Building,  
Erie, Pennsylvania.

GIFFORD, GRAHAM, MACDONALD & ILLIG,  
*Of Counsel.*

April, 1959.

# INDEX.

|   | PAGE |
|---|------|
| Question Presented .....                              | 1    |
| Constitutional Provisions and Statutes Involved ..... | 2    |
| Statement .....                                       | 2    |
| Summary of Argument .....                             | 4    |
| Argument .....  | 7    |
| Conclusion .....                                      | 28   |

## CITATIONS.

### Cases:

|   |               |
|---|---------------|
| Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 .....                        | 21            |
| Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. 525 .....                                  | 5, 18, 19, 27 |
| D'Alessandro v. Barfield, 348 Pa. 328, 35 Atl. 2d, 412 .....  | 25            |
| Erie Railroad Co. v. Tompkins, 304 U. S. 64 .....   | 21            |
| Guaranty Trust Co. of N. Y. v. York, 326 U. S. 113 .....  | 21            |
| Herdman v. Pennsylvania Railroad Co., 352 U. S. 518 .....   | 26            |
| Jacamino v. Harrison Motor Freight Co., 135 Pa. Superior Court 356, 5 Atl. 2d, 393 .....                  | 10            |
| Jaeger v. Sidewater, 366 Pa. 481, 77 Atl. 2d, 434 .....   | 8, 14, 17,    |
|   | 21, 23        |
| Klaxon v. Stentor Electric Co., 313 U. S. 1020 .....  | 21            |
| Myers v. Reading Co., 331 U. S. 477 .....   | 20            |
| Persing v. Citizens Traction Co., 294 Pa. 230, 144 Atl. 97 .....  | 21, 24        |
| Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 .....  | 21            |
| United New York and New Jersey Sandy Hook Pilots Association v. Halecki, U. S. _____, 79 S. Ct. 517 ..... | 21            |

## II.

PAGE

### Constitutional Provisions and Statutes:

|   |       |
|---|-------|
| Federal Rules of Decision Act, 28 U. S. C. A. 1652 . . . . .  | 2, 21 |
| Section 104 of the Pennsylvania Workmen's Compensation Act, 77 Purdon's Pa. Stat. Ann., Sec. 22 . . . . . | 2     |
| Section 203 of the Pennsylvania Workmen's Compensation Act, 77 Purdon's Pa. Stat. Ann., Sec. 52 . . . . . | 2     |
| U. S. Constitution, Amendment VII . . . . .   | 2, 17 |

# Supreme Court of the United States

OCTOBER TERM, 1958

---

No. 439

---

JACKSON D. MAGENAU, Administrator of the Estate  
of Norman Ormsbee, Jr., deceased,

*Petitioner,*

vs.

AETNA FREIGHT LINES, INC.,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

---

## BRIEF FOR RESPONDENT

---

### Questions Presented

In a diversity case, where Petitioner's evidence was to the effect that an unforeseen contingency had arisen during the transportation of a load of steel by a common carrier (Respondent), which made it necessary for the respondent's driver to engage petitioner's decedent to accompany respondent's driver for the remainder of the trip, in order to protect respondent's interests, and where that issue was specifically left to the jury's consideration after full, complete and unchallenged charge by the Court, has petitioner

been denied a jury trial when such jury finding, upon acceptance by a reviewing court, is applied to the law of Pennsylvania, the state where the cause of action arose?

Where there is no dispute between the parties to an action as to a particular factual question, must a party ask that additional instructions be given the jury particularly when the very factual question involved is included in a Special Interrogatory directed to the jury in language agreeable to both parties?

### **Constitutional Provisions and Statutes Involved**

The Constitutional provision which Petitioner alleges is involved in the Seventh Amendment to the United States Constitution. The statutes involved are the Pennsylvania Workmen's Compensation Act, Sections 104 and 203 (77 Purdon's Pa. Stat. Ann. Secs. 22, 52) and the Federal Rules of Decision Act (Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U. S. C. A. 1652). The Seventh Amendment and the provisions of the Pennsylvania Workmen's Compensation Act are set forth in full in Petitioner's Appendix. The Federal Rules of Decision Act is as follows:

“The laws of the several states; except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

### **Statement**

This was a negligence action brought in the Federal District Court on the basis of diversity jurisdiction. Petitioner, as administrator of the Estate of Norman Ormsbee, Jr., brought suit against Respondent alleging that the latter was responsible for the death of said decedent because of

an accident which occurred on March 20, 1956 near Rochester, Pennsylvania.

Prior to that date, one Daniel Fidler, owner of the tractor-trailer, had leased the equipment to Respondent for use in its regular business of transporting freight under a permit from the Interstate Commerce Commission. On or about March 13, 1956, Respondent's driver, Charles Schroyer, picked up a load of steel at Syracuse, New York, which load was consigned to Crucible Steel Corp., at Midland, Pennsylvania. While enroute from Syracuse to Buffalo, Schroyer encountered tire trouble and also had had brake difficulty, which Respondent's superintendent at Buffalo had endeavored to adjust.

On the afternoon of March 20, 1956, Respondent's driver stopped at Jones' Tavern at Waterford, Erie County, Pennsylvania. There he talked to the tavern owner to whom he complained that he was having trouble with the brakes. A few minutes later, Petitioner's decedent and Herbert Brown entered the tavern. Schroyer offered Brown \$25 if Brown would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Petitioner's decedent to go on the trip for \$25.00, stating that he was having trouble with the brakes on the tractor and also on the trailer. Petitioner's decedent accepted the offer and the two got into the tractor. This was the last that they were seen alive. Later that evening, the Pennsylvania State Police received a call and in response thereto found the tractor-trailer over an embankment along the highway about four and one-half miles east of Rochester, Pennsylvania, and both men dead.

Petitioner's entire theory throughout the trial was to prove the facts set forth above surrounding the circum-

stances under which Petitioner's decedent came to be on the tractor. Petitioner asked the Trial Judge to charge on these facts which Petitioner presented and to further charge that if the jury accepted Petitioner's testimony, then the jury could find that an emergency arose which necessitated Respondent's driver in engaging Petitioner's decedent to accompany him for the remainder of the trip to protect Respondent's interests. This the Trial Judge did (R. 183a and 184a). In addition, the Trial Judge submitted special interrogatories, the first of which was exactly in accordance with Petitioner's theory as set forth immediately above. The jury answered this special interrogatory, saying, as Petitioner's theory was, that such an emergency had arisen and that the situation necessitated Respondent's driver in engaging Petitioner's decedent. The jury returned a verdict for Petitioner which the Trial Court refused to set aside. On appeal to the United States Court of Appeals for the Third Circuit, the Court, by Circuit Judge Goodrich, held that the special interrogatory was clear, and that the jury's answer thereto was clear and that such determination constituted Petitioner's decedent an employee under the substantive law of Pennsylvania. Therefore, the Court of Appeals held that under the jury's determination, Petitioner's sole remedy against Respondent was under the Pennsylvania Workmen's Compensation Act.

### Summary of Argument

#### I

Petitioner's evidence, Petitioner's theory, and Petitioner's requests for instructions, all were to a determination of the status of Petitioner's decedent while he was on Respondent's vehicle. Petitioner sought to establish that Ormsbee was hired by Respondent's driver to go along on the remainder of a trip involving the delivery of steel when

an emergency arose with respect to the operation of Respondent's vehicle which required the assistance of Ormsbee to protect Respondent's interests.

Respondent's position was that no emergency had occurred and that Ormsbee was a mere trespasser as to Respondent.

This factual dispute was clearly submitted to the jury under a clear Charge by the Court and a clear Special Interrogatory which asked the jury to determine whether an emergency did exist; whether such emergency made it reasonably necessary for Respondent's driver to secure the assistance of Ormsbee; and whether such assistance was needed to protect Respondent's interests. The jury answered all of these propositions in the affirmative. This was in exact accord with Pennsylvania law, as cited by Petitioner.

Such finding of the jury required the application of the Pennsylvania Workmen's Compensation Act as the only remedy available to Petitioner, because it met all of the tests required by the Pennsylvania cases cited hereinafter.

When the Court of Appeals held that the jury's holding required that Court to decide that Petitioner's only remedy was under the Pennsylvania Workmen's Compensation Act, it did not review the evidence to override the jury—it applied the jury's determination to the applicable law. This was in no way a violation of the principles laid down in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525 because the Court of Appeals did not re-evaluate the evidence to determine if the jury was right or wrong.

## H

There was no dispute between the parties nor the Court as to the business in which Respondent's vehicle was en-

gaged at the time of the accident. Ormsbee's presence was, as Petitioner's own counsel stated, to help in case of a breakdown, or to protect the load in case of a breakdown. Both of these matters are directly associated with Respondent's regular course of business, namely, transportation of goods by motor vehicle.

Since there was no dispute on this point, there was no need for Respondent to seek additional instructions to the jury. Petitioner knew that his evidence brought the employment of Ormsbee into direct play in the trial. If Petitioner felt that such employment was possible without causing his remedy to lie solely under the Pennsylvania Workmen's Compensation Act, Petitioner should have protected himself by seeking qualifying instructions. This Petitioner did not do.

On the other hand, Respondent did seek binding instructions to the effect that if the jury accepted Petitioner's view that Ormsbee was hired under the evidence, then the Workmen's Compensation Act would apply, but this request for instructions was denied, to which Respondent specifically excepted.

Finally, the question upon which Petitioner now alleges that Respondent should have sought additional instructions was actually submitted to the jury was embodied in the First Special Interrogatory when the jury was asked whether Ormsbee's assistance was needed to protect Respondent's interests. The only interests which Respondent had at the time of the hiring were with respect to his business purpose—transportation of goods. "Respondent's interests" were its regular course of business and jury affirmed that the hiring occurred therein.

## ARGUMENT

### I.

In adopting the jury's special finding which was based upon Petitioner's evidence, Petitioner's request for jury instructions and the Court's charge based thereon, the Court of Appeals did not usurp the federal practice of leaving disputed questions of fact to the jury for its determination.

Petitioner's position, as set forth in his brief, is that Petitioner was denied his rights to trial by jury in this diversity case when the Court of Appeals for the Third Circuit reversed a judgment of the United States District Court for the Western District of Pennsylvania. Petitioner argues that even though the Court of Appeals accepted the *jury's* determination on the basic factual issue involved, that Court could not apply the Pennsylvania law as to effect of the *jury's* determination.

The question of denial of jury trial was first raised by Petitioner in his Petition for a Writ of Certiorari. At no time, either during the argument before the Court of Appeals, in his brief filed with the Court, or in his motion for rehearing and the brief which accompanied it, did Petitioner raise the constitutional issue now being presented. The Court of Appeals at no time had any opportunity to examine Petitioner's present position nor to determine whether it applied to the circumstances of this case.

As a matter of fact, Petitioner's position with respect to Motion for Reargument directed to the Court of Appeals was a claim that that Court had no power to determine the applicability of the Pennsylvania Workmen's Compensation Act because, Petitioner asserted, that question was

strictly for the administrative agencies set up under that Act.

Because Petitioner in his present brief constantly maintains that it was Respondent which was attempting to establish a legal defense that the remedy of Petitioner was only under the Pennsylvania Workmen's Compensation Act, an examination of the Record must be made to demonstrate that it was Petitioner who was introducing the evidence on the point, who was proving an emergency or unforeseen contingency, who used that as his basis for proving the status of Petitioner's decedent on Respondent's tractor-trailer, who presented points for charge to like effect, and who did not except to the Court's charge with respect thereto. Petitioner's position was thusly taken because Respondent was maintaining that under applicable Pennsylvania law, a rider on an interstate carrier is a trespasser as to that carrier. *Jaeger vs. Sidewater*, 366 Pa., 481, 77 Atl. 2d, 434. Petitioner, therefore, sought to prove that Petitioner's decedent was a rider on the Respondent's unit because an unforeseen emergency had arisen which necessitated his presence in order to further Respondent's business interests—which were the transportation of goods in interstate commerce. The proof which Petitioner adduced and upon which Petitioner relied was as follows:

1. Witness Herbert L. Brown (R. 33a-44a)—This was Petitioner's first witness, and on direct examination Brown testified that Respondent's driver, Schroyer, stated in the Tavern that he was having trouble with the truck (R. 38a). Petitioner then proved through Brown that Schroyer offered \$25.00 to Brown to go along on the remainder of the trip. Brown refused the offer. Brown then testified that the same offer was made to Petitioner's decedent, who accepted. Brown was asked by Petitioner's counsel the rea-

son which Schroyer gave for making the offer. Respondent objected to this testimony as pure hearsay. Petitioner's counsel stated that the purpose of the testimony was (R. 36a):

"Mr. Gornall: Your Honor, we frame this question in this manner to show the intent, purpose and motive of Mr. Schroyer in offering employment to this man. We realize that it is hearsay, but it comes in under the —first of all, under the testimony of the man acting in the *course of his employment*, secondly under the *res gestae*, and thirdly, to show the intent, purpose and motive. I don't believe—

The Court: Intent and purpose and motive of what?

Mr. Gornall: To show the reason why this man *hired* Norman Ormsbee to go with him."

As Petitioner's counsel stated, and as the Court understood, and with which the Court agreed, this testimony was for the sole purpose of showing why Respondent's driver "employed" and "hired" Norman Ormsbee to go on the truck.

Further, as Petitioner's counsel asserted in order to make this testimony admissible, it was Petitioner's position that Respondent's driver's statements as to why he hired Ormsbee were made in the course of his employment as the Respondent's driver (R. 36a—Mr. Gornall); (R. 37a—The Court says that the statements of Schroyer were "in the *course of his employment*".)

2. Witness Charles Jones (R. 46a-61a)—This also was Petitioner's witness. Mr. Jones was also at the tavern when, as Petitioner alleged, Respondent's driver employed Ormsbee. Jones, on *direct* examination by counsel for Petitioner, testified that the offer of \$25.00 was made by Respondent's driver to Petitioner's decedent and that it was accepted. He, *over Respondent's objection*, was likewise permitted to testify that the reason why Respondent's driver asked Ormsbee to go along on the remainder of the

trip was because Schroyer was having brake trouble on the tractor and also on the trailer (R. 58a).

3. Respondent, on cross examination of the above two witnesses, sought to prove that Ormsbee had not been offered the \$25.00 because Schroyer needed the help of Ormsbee in the emergency which existed, but because Schroyer was merely trying to prove how much he made on a trip. Respondent's position remained constant, because if all Schroyer wanted with Ormsbee on the truck was to prove a brag as to how much he made on a trip, this would be strictly a personal reason of the driver, and Ormsbee would remain a trespasser as to Respondent. *Jacamino vs. Harrison Motor Freight Co.*, 135 Pa. Superior Ct., 356, 5 Atl. 2d, 393. But the jury, as the answer to the First Special Interrogatory clearly established, accepted Petitioner's theory of emergency and necessity for assistance (R. 199a), and did not accept Respondent's theory of Ormsbee being a rider for Schroyer's personal reasons.

4. Petitioner then continued to prove the factual basis for the application of the Pennsylvania emergency rule by the next witness, Adelbert Rice, Respondent's Buffalo Terminal Manager (R. 61a-70a). Through Rice, Petitioner proved that Schroyer had complained about his brakes on the day before the accident.

5. At the conclusion of Petitioner's case, Respondent moved for a compulsory dismissal on the ground that Petitioner had not established that Ormsbee was on the truck for any purpose of Respondent. Petitioner's counsel argued that he was, as follows:

(R. 113a):

"If the Court please, the case we have to deal with is *Jaeger against Sidewater*, cited in 366 Pa., 481. In that case we had a minor plaintiff, a boy who was in-

vited by the driver to get on the truck to assist him in making some deliveries, and then given a ride home, and the Court said that there is no implied authority to *hire* an assistant, there must be evidence of an unforeseen contingency, and it is impractical to communicate with the employer making the appointment necessary in order to safeguard the employer's interests."

(R. 114a):

"The question is whether *our evidence* in this case develops an unforeseen contingency or an emergency arising.

• • •  
I think it is a legitimate inference, in view of the trouble he was having, he was fearful he was going to break down on the road, he needed somebody to give him help at that particular point."

(R. 115a):

"(Ormsbee was) To help in the case of a breakdown."

(R. 116a):

"You can understand for instance suppose the thing is wrecked, you have got a *valuable load* laying around a field in a storm, something like that, certainly a servant would have authority to engage a helper to help him protect, cover up with a tarpaulin."

(R. 117a):

"I think in this case *the jury* can infer he (Schroyer) wants help in case of a breakdown."

6. In the discussion between counsel and the Court relative to Respondent's motion for a compulsory dismissal, the Trial Judge stated (R. 119a) that he doubted whether Petitioner's counsel had established an emergency under the Pennsylvania case law but that he would leave it to the *jury* under special interrogatories.

7. At the conclusion of all of the evidence by both sides, the Petitioner presented certain requests for instructions. Petitioner's very first point for instructions was:

"An agent has implied authority to *employ* an assistant where an unforeseen contingency arises making it impractical to communicate with the agent's principal, and making the appointment of an assistant reasonably necessary for the protection of the interests of the principal entrusted to the agent; and if you find such to be the fact in the case, then Norman Ormsbee, Jr. would not be a trespasser upon defendant's vehicle."

The Court read this request for instructions to the *jury* and affirmed it as a correct statement of the law (R. 189a). Under this instruction, and as is shown later on with respect to the Court's charge, the Court left it to the jury to determine the factual issue presented by Petitioner's evidence—namely, did such an emergency exist? This was an instruction to the jury to determine whether Respondent's driver had implied authority under Pennsylvania law to employ an assistant because of the emergency.

8. In discussion between counsel for both parties and the Court with respect to the charge and the requests for instructions to the jury submitted by both sides, the Court was constantly of the opinion that there was insufficient evidence to go to the jury on the question of an emergency. But he finally did leave it to the jury by reason of the Charge and the First Special Interrogatory. The Charge was (R. 183a and 184a):

"Now as related to negligence, the Aetna Freight Lines, the defendant in the case, would not be responsible for want of care, for negligence, unless the deceased Mr. Ormsbee was in that truck with its permission, by its consent express or implied, and the law is that the driver can't give the consent, except in this case of emergency, and that is why this testimony brought

out on the part of the plaintiff to indicate there was such an emergency there that authorized, they think under the law, that would permit Mr. Schroyer to invite Mr. Ormsbee to complete the trip with him, but unless you find in this case that an emergency arose and it was such an emergency that Mr. Schroyer was unable to perform it alone, that is his duties for the continuance of the trip because of what has been brought out here, if you accept the proposition that the brakes were bad, and if that was the type of emergency then he would be privileged to take on this assistant Mr. Ormsbee. In that event, ordinary negligence if there was ordinary negligence, Mr. Ormsbee being free of contributory negligence would support a verdict for the plaintiff based on ordinary negligence, without any relation to Count 1, but again, except as the driver could confer such right, the plaintiff stood in no relation with the defendant whatsoever, the latter owed him no duty of protection. It is a rule universally recognized that the relation of master and servant cannot be imposed upon a person without his consent, express or implied. It is upon the exception to this general rule which is quite as well settled as the general rule itself, that the plaintiff relies in this case to establish the relation of master and servant under this evidence. The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but you have to find an emergency on the road confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected in the interests of the employer that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him to complete the trip.

"With that I am going to mention the interrogatories to the jury. I am going to ask you to answer four questions. Number 1 relates to the proposition, 'Under the evidence in this case do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the

decedent Norman Ormsbee to accompany him for the remainder of the trip?" and the words there 'unforeseen contingency' mean the emergency that I have just mentioned, the inability of Mr. Schroyer to cope with it alone. If you think it reasonable that he engage an assistant, why then you may answer that Interrogatory Number 1, you may answer that in the affirmative."

9. Petitioner's theory that an emergency had arisen and that the jury could so determine was thus clearly left to the jury's determination by the First Special Interrogatory, which read (R. 184a and 185a):

"Under the evidence in this case do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver, Charles Schroyer, engage the decedent, Norman Ormsbee, to accompany him for the remainder of the trip?"

This Interrogatory was solely and emphatically based upon Petitioner's own theory. It was based upon Pennsylvania substantive law as shown by *Jaeger vs. Sidewater, supra*. It left to the jury the disputed fact as to why and under what circumstances Petitioner's decedent came to be on Respondent's vehicle. The United States District Court did not decide this issue from an examination of the evidence. It left it to the jury. The Trial Judge explained to the jury what the meaning of the Interrogatory was and how it was to be applied to the evidence in the case by the jury, when, in his Charge, immediately after reading that Interrogatory, he charged (R. 185a):

"and the words there 'unforeseen contingency' mean the emergency that I have just mentioned, the inability of Mr. Schroyer to cope with it alone. If you think it reasonable that he (Schroyer) engage an assistant, why then you may answer that Interrogatory Number 1, you may answer that in the affirmative."

The Court also devoted much time in charging the Jury as to when a servant has implied authority to engage an assistant and hence bind his master (R. 183a, 184a and 185a).

In summary, what the Court did here was to leave to the jury the factual determination whether or not an emergency had arisen, and whether that gave rise to implied authority on the part of Respondent's driver to engage an assistant. *The jury held that there was.*

But, Petitioner says, the jury was not asked to determine whether or not this employment of Ormsbee was in the regular course of the business of Respondent, and because this was not asked, the jury's verdict must be re-instanted! Petitioner argues that this is so because otherwise, Petitioner says, he was denied jury trial when the Court of Appeals for the Third Circuit applied Pennsylvania law to the effect that the regular course of business of Respondent was the transportation of goods.

We have searched the Record for one single, solitary instance where Petitioner maintained that the activities of Respondent's driver and the purpose of Petitioner's decedent in being on the truck were not in the regular course of Respondent's business. On the contrary, Petitioner and the Trial Court at all times agreed that all activities of Respondent's driver and Petitioner's decedent were with respect to Respondent's business and interests.

At R. 166a, Petitioner's counsel, in discussing with the Court requests for instructions to the jury, and in arguing that there was sufficient evidence to go to the jury, had this to say:

"The Court: Here is the point of that. You have got this, I don't know whether even though it is hearsay, whether he can make Ormsbee an employee for compensation purposes without the consent of the employer even though he is an emergency; the cases say he can?"

Mr. Weber (Respondent's trial counsel): The cases as far as I found last night say if the circumstances

were met that it was necessary in the conduct of the employer's business and he becomes an employer (*sic.* employee).

Mr. Gornall: *In the ordinary conduct of his business.*"

Again, referring to R. 38a, where Petitioner's counsel was successful in getting hearsay statements of Respondent's dead driver into the record, the basis for Petitioner's position was that such statements were made by Respondent's driver in the course of his employment. Thus, it can easily be seen that Petitioner was constantly of the opinion that there was absolutely no dispute here that Schroyer was at all times in the course of his employment, and as reference to R. 166a shows, Petitioner's counsel always agreed that Ormsbee's employment was in the "ordinary conduct" of the Respondent's business.

Again, at R. 174a, Petitioner's counsel emphatically reiterated his position when he said:

"Made it reasonably necessary for the protection of the defendant's interests. *Defendant's interests, not driver's interests.*"

Now, just what were defendant's interests which *Petitioner* constantly alluded to which were to be protected by the assistance of Ormsbee? Petitioner's witnesses did not specify the *exact* thing or things that Ormsbee was to do; but Petitioner constantly stated to the Court that the jury could infer it was for protection of the load, or help in the event of a breakdown. Both of these inferences, and, as a matter of fact, any inference growing out of Petitioner's evidence of trouble with brakes on the vehicle, were, and could be, only related to what the vehicle and its driver were doing on behalf of Respondent—transporting a load of steel. There is in this Record no argument by Petitioner's counsel at any place to the effect that Ormsbee's presence

on the vehicle was required other than in connection with transporting that load. Vehicles carrying cargo in interstate commerce was Respondent's regular course of business. Ormsbee, according to Petitioner, was brought on the vehicle because of an unforeseen contingency. Contingency connected with what, if not either the vehicle or its load or both? Petitioner argued at trial that Ormsbee's purpose in being on the unit was not personal to either him or to the driver—it was with respect to Respondent's interests. And whether the emergency required Ormsbee's presence to protect defendant's interests, was specifically submitted to the jury by the charge, the Petitioner's requests for instructions, and the Special Interrogatory. To say that because the Interrogatory didn't speak of Respondent's regular course of business instead of Respondent's interests, is a play on words—words which Petitioner at all times in this Record treated as identical. At no time in the Record was there any dispute between the parties or the Court as to whether Ormsbee's presence was required on the vehicle while it was on the regular business of Respondent. *The factual dispute was as to whether an emergency existed as defined by Pennsylvania law.* The Trial Judge held grave doubts as to whether there was sufficient evidence on this issue to go to the jury, *but he still left it to the jury.*

Thus, this question arises: Where the jury decided the factual issue in dispute, and such issue was determined by the jury after instructions admittedly based upon the applicable Pennsylvania law and in the language of the Pennsylvania Supreme Court case which establishes that principle (*Jaeger vs. Sidewater, supra*—cited to the Court by Petitioner as the applicable law, R. 114a), does a Reviewing Court violate the Seventh Amendment when it decides that the effect of that Pennsylvania substantive law must apply?

To put it another way, does a Federal Court have the power to apply the legal conclusion that follows from a jury's determination of a disputed finding of fact?

Petitioner says that *Byrd vs. Blue Ridge Rural Electric Cooperative*, 356 U. S., 525, decides that the Court has no such power.

In the *Byrd case, supra*, a negligence action was brought in the District Court for the Western District of South Carolina, on the basis of diversity of citizenship. The Respondent in that case raised the affirmative defense that the Petitioner's only remedy against that Respondent was under the South Carolina Workmen's Compensation Act. Petitioner did not, in any part of his case, introduce testimony attempting to rebut the affirmative defense. To have done so would have been anticipating a defense and undoubtedly would have been stopped by the Trial Judge. The Respondent, in its case, introduced evidence bearing on the affirmative defense. At the conclusion of the entire case, Petitioner moved the Court to strike the affirmative defense as not having been established under the law of South Carolina. This motion the Trial Court granted. Petitioner therefore did not introduce any rebuttal evidence to contradict the Respondent's evidence bearing on the affirmative defense. There was no need to—Petitioner's motion had been granted, and the affirmative defense had been stricken. Petitioner then received a verdict from the jury. After motion for new trial and judgment *n. o. v.* were refused, Respondent appealed to the Court of Appeals which, upon making an independent examination of Respondent's evidence bearing on the affirmative defense, reversed, and held that, as a matter of law, under appellate decisions of the South Carolina Supreme Court, the affirmative defense had been established, and that Petition-

er could not recover except under the South Carolina Workmen's Compensation Act. Upon certiorari being granted by this Court, it was held that a new trial was required because Petitioner had not been afforded an opportunity to rebut Respondent's evidence bearing on the affirmative defense and, then, the jury should decide the ultimate factual matters bearing thereon.

This Court said, at page 896, that one of the questions presented was whether that Petitioner, "state practice notwithstanding, is entitled to a jury determination of the *factual issues* raised by the defense". The defense had raised the question that, based on its evidence, which was not disputed by that Petitioner (because he was foreclosed by the Trial Court's striking of the affirmative defense), Petitioner was a "statutory employee" within the meaning of the South Carolina Workmen's Compensation Law. Respondent there maintained that he was barred because at the time of the injury he was doing work of the kind also done by the Respondent's own construction and maintenance crews. Whether Petitioner there was doing work of the kind which Respondent's crews did was not submitted to the jury because the Trial Court struck out that defense upon its own interpretation of South Carolina law. The Court of Appeals then held that the defense should have remained in the case and that, since under South Carolina law the Court decided whether the evidence sustained the defense or not rather than the jury, it would do likewise.

But, evidence surrounding the type of work of the Petitioner in *Byrd* was never submitted to the jury. If the evidence had been submitted to the jury and the jury had found by a special interrogatory that Petitioner was doing the same work as Respondent's crews, would the Court

of Appeals have been without authority to then say—“That being what the jury decided, the remedy is under South Carolina Workmen’s Compensation Law”? The decision in Byrd has no such language and no such import.

This Court has long recognized that the jury’s function is to decide the *disputed* factual questions, and the Court is to apply the jury’s factual determination to the applicable law.

In *Myers vs. Reading Co.*, 331 U. S. 477, a plaintiff was injured by an allegedly “defective brake on a train. He brought suit under the Safety Appliance Act. The Court, by special interrogatory, asked the jury to determine whether or not there was a defective brake. The *Trial Court* did not ask the jury to then say whether, if there was a defective brake, that constituted a violation of the Safety Appliance Act. This Court held that it would determine only whether or not there was sufficient evidence upon which the jury could determine that a defective brake existed. The Court would then determine if, upon the jury’s factual conclusion, such defective brake constituted a violation of the Act.

That’s exactly what the Court of Appeals for the Third Circuit did in this case. In the opinion written by Judge Goodrich, he says at R. 231:

“Thus the matter turns in the final analysis on a question of fact, that is, a sufficient state of emergency to justify the enlisting of another to help assist in the business to be done. The *jury’s finding* is a forthright answer to a forthright question. The Trial Judge who hear all the testimony was satisfied with it. We do not think on this state of the record that we would be justified in setting it aside.”

In other words, the Court of Appeals took the jury’s finding and applied it. That Court did not review the evidence

to see whether there was evidence to sustain the jury's finding. The Court adopted it. By adopting it, the only result under Pennsylvania law was that Petitioner then had no course of action under Pennsylvania negligence law but only under Pennsylvania Workmen's Compensation Law.

*Erie Railroad Co. vs. Tompkins*, 304 U. S., 64, and the Rules of Decision Act (Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U. S. C. A. 1652) require that the Court of Appeals make such application of Pennsylvania law. As recently as February 24, 1959, this Court in *United New York and New Jersey Sandy Hook Pilots Association vs. Halecki*,

U. S., \_\_\_, 79 S. Ct., 517, this Court, speaking through Mr. Justice Stewart, said: "We hold that the Court of Appeals was correct in viewing its basic task as one of interpreting the law of New Jersey." *A fortiori*, if the law of the state where the cause of action arises is settled in appellate court decisions, the federal courts are bound by that in diversity cases.

Thus, state statutes of limitations are binding on federal courts in diversity cases; and if the facts are not in dispute, the federal court applies the statute. *Guaranty Trust Co. of N. Y. vs. York*, 326 U. S. 113, and *Ragan vs. Merchants Transfer & Warehouse Co.*, 337 U. S. 530. Also, state conflict of law rules are binding. *Klaxon vs. Stentor Electric Co.*, 313 U. S., 1020. State Court interpretation and construction of state statutes are likewise binding upon federal courts in diversity cases. *Aero Mayflower Transit Co. vs. Board of Railroad Commissioners*, 332 U. S., 495.

Here, under *Persing vs. Citizens Traction Co.*, 294 Pa., 230, 144 Atl. 97 (1928), and *Jaeger vs. Sidewater*, *supra*, the law of Pennsylvania is clear that where an emergency

exists which requires the assistance of a person to protect the interests of the employer, that assistant has remedies only under the Pennsylvania Compensation Act. Here, the fact that assistance was required in the ordinary business of the Respondent was at no time disputed by Petitioner during the trial, but on the contrary, was, as heretofore discussed, asserted by them. As the Petitioner's request for instruction so clearly set forth to the jury—if an emergency existed, the jury could find that Respondent's driver "had implied authority to employ an assistant to protect defendant's (Respondent's) interests". "Defendant's interests" were the furtherance of the transportation of goods by motor vehicle. The jury's answer to the First Special Interrogatory was an unqualified "Yes". It adopted Petitioner's own theory of Pennsylvania law. The Court of Appeals didn't review this jury finding as Petitioner so strenuously argues. It adopted it. Such adoption caused the only result possible—a holding that under Pennsylvania law, Petitioner's remedy lay in workmen's compensation.

## II.

Since the Trial Judge left the disputed question of the status of Petitioner's decedent to the jury under instructions which were in exact accordance with Pennsylvania law, there was no need for Respondent to request additional instructions.

The second point discussed by Petitioner in his brief is divided into two parts—first, that if Respondent wanted a determination from the jury as to whether or not Ormsbee was an employee of Respondent, Respondent should have insisted upon additional instructions by the Court and another special finding from the jury; second, that since Re-

spondent did not seek such instructions, a new trial should not be ordered because such would be giving Respondent a second chance, to which it is not entitled!

There is absolutely no support for the first portion of Petitioner's position in the Record, and Petitioner completely fails to show where the Record is deficient. On the other hand, the Record clearly establishes that the Court's charge was proper. As a matter of fact, it was in exact accord with the position of Petitioner and his Requests for Instructions! It was, with respect to the disputed status question, based almost verbatim upon the principle of law which Petitioner wanted applied. It was in accordance with the language of the Pennsylvania Supreme Court in the case which Petitioner cited to the Court for his position, that is, *Jaeger vs. Sidewater, supra*.

As we have pointed out in previous argument, there was no dispute on any question relating to status, except as to the existence of an emergency justifying Ormsbee's employment. Petitioner argued there was. Respondent argued that there wasn't, and, hence, Ormsbee was a trespasser as to Respondent. What other disputed factual issued remained relative to Ormsbee's status?

Since Petitioner constantly contended that the emergency justified the employment of Ormsbee to protect defendant's interests—and those interests were only with respect to defendant's transportation of goods—there was no dispute on the issue of regular course of business. The Record certainly shows no dispute. Petitioner's position that the jury could infer that Ormsbee's presence under the emergency was either to aid in case of a breakdown of the vehicle, or to protect the load, are both the very fundamental elements of Respondent's regular course of business—transporting goods by vehicle. The test is what

Ormsbee was to do in his employment. No testimony was adduced by Petitioner to show that such employment was other than to protect the load or the vehicle in case of breakdown. Thus, no disputed issue was raised on this point. If no dispute did exist, there certainly was no need for additional instructions particularly when the special interrogatory was phrased to include a finding by the jury as to employment of Ormsbee to protect "defendant's (Respondent's) interests". The jury was not just asked to find whether an emergency existed. It was asked to find whether an emergency existed which made it reasonably necessary for the protection of Respondent's interests. The Court's charge likewise set this forth as a necessary element for the jury to determine. Therefore, when the jury answered that an emergency existed, it likewise answered that that emergency made it reasonably necessary to employ Ormsbee to protect Respondent's interests.

Petitioner's counsel was warned by the Court before the charge that they "were in a little bit of a dilemma" (R. 166a); further, that they wanted the jury to find that Schroyer hired Ormsbee—that they (Petitioner's counsel) were drawing themselves into the employee situation. Petitioner's counsel was therefore on notice of the effect of their own testimony and their own theory. But even with this warning, Petitioner's counsel, if they felt that because of their evidence and their theory it still didn't bring them within the holdings of the Pennsylvania Supreme Court, could have themselves sought further instructions from the Court and additional special findings from the jury. This they did not do. And the reason why is readily apparent.

Petitioner argued to the Trial Judge and later to the Court of Appeals that the holding of the Pennsylvania Supreme Court in *Persing, supra*, didn't apply because of

the case of *D'Alessandro vs. Barfield*, 348 Pa., 328, 35 Atl. 2d, 412. In other words, Petitioner wasn't disputing the fact that the charge of the Court was ample on the question of status, but they argued that the jury's finding didn't require the conclusion that the Workmen's Compensation Act applied because Ormsbee wasn't hired to perform services on Respondent's premises. Petitioner never once contested regular course of business. Petitioner did argue only that for the Workmen's Compensation Act to apply, the services had to be on-premises services.

Therefore, for Petitioner to now argue (for the first time) that regular course of business of Respondent was in dispute, just is not so. Since it never was in dispute, there was no need for the Court to charge any more than it did charge on the subject at R. 184a:

"The exception is that a servant may engage an assistant in the case of emergency where he is unable to perform the work alone, but *you* (jury) have to find an emergency on the road (during transportation of goods) confronting Schroyer that night that he couldn't go alone, it was reasonable in his opinion, and it was to be expected in the *interests of the employer* that he had the implied power, he did have the power to engage an assistant, and engaged Mr. Ormsbee to go along with him *to complete the trip* (again, transporting the goods to destination)."

Furthermore, Petitioner agreed that once the jury answered the First Special Interrogatory, the Court would apply Pennsylvania law. At R. 173a, the Court said that the "finding of trespasser is a conclusion of law". Petitioner's counsel said "the same as employees". This is a complete recognition by Petitioner's counsel that once the First Special Interrogatory was answered by the jury, that answer determined whether the conclusion of law that Ormsbee was a trespasser or an employee would follow.

The jury's affirmative answer called for the conclusion that Ormsbee was an employee. A negative answer would have called for the conclusion that he was a trespasser. Petitioner did not challenge this as correct—and it is correct.

No, Respondent had no duty or responsibility to seek additional instructions when it was patently clear that Petitioner's counsel, the Court and Respondent's counsel were all agreed that the jury's answer was all that was needed. For Petitioner to now say that he disagrees with that to which he did agree at trial and for that reason Respondent should have sought additional instructions is truly after-thought. If anyone can be accused of "strategy", as Petitioner accuses Respondent of using during trial, it must be said that Petitioner has now adopted new strategy.

We further ask—could this jury have held on the evidence presented by Petitioner or Respondent that Ormsbee's employment was not connected with Respondent's regular course of business? What evidence does Petitioner point to upon which such a jury finding could ever be sustained? Absolutely none. Certainly, if a jury finds that an object is black, when every bit of evidence is that the object is white, a court can reverse that jury's finding as not being based upon a scintilla of evidence. This Court has very recently recognized that even in Federal Employer Liability Cases, the Appellate Courts can examine the record to see if there is any evidence to support a jury's verdict. *Herdman v. Pennsylvania Railroad Co.*, 352 U. S. 518. Therefore, since there was no evidence disputing the fact that Ormsbee's employment was with respect to transporting goods in commerce, a jury's holding to the contrary could never stand.

Petitioner's final point that the mandate of this Court should be to reinstate the verdict is wholly without merit. Petitioner advances this as the solution to the problem on the ground that Respondent failed to seek a necessary instruction and having failed to do so, Respondent must be punished.

As we have pointed out above, no such additional instructions were required in this case. Assuming that they were, we maintain that the least that should be done is to remand the case to the Court of Appeals for its determination of the other issues not discussed by it in its opinion because the Court of Appeals decision made such discussion unnecessary, or in the alternative a new trial should be granted. This is not "second chance"—this is not abusing the orderly administration of justice. On the contrary, if *Byrd* does apply to this case, a new line of demarcation has been created by that case in the handling of judge-jury questions, and both parties should, in the interests of *equal* justice, have the case presented to a judge and jury with the new limits in mind.

This latter point, however, we maintain is not the remedy called for. We maintain that the review of the case as made by the Court of Appeals is the only correct one. Petitioner has himself recognized that a remedy exists to him even in view of the decision of the Court of Appeals. He has filed a Petition for Workmen's Compensation which is still pending. The holding of the Court of Appeals merely affirms that under Petitioner's own facts and theory, that is where his remedy properly lies.

## CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

JOHN E. BRITTON,  
WILLIAM F. ILLIG,  
615 Masonic Building,  
Erie, Pennsylvania.

GIFFORD, GRAHAM, MACDONALD & ILLIG,  
*Of Counsel.*